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Judgment on Genocide

Prosecution Closing Argument

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The witnesses we have just had the privilege of hearing have had the courage and the strength to speak truth to power. Their story of life in Darfur is one of destruction and denial.

The government of Sudan—through the coordinated work of its military, its militia, and its proxy warriors the *janjiweed*—has systematically destroyed all that makes life possible in Darfur. As the evidence presented here reveals:

- Forces of the government of Sudan have exploited and oppressed the civilian populations of Darfur.
- Forces of the government of Sudan have torched villages, shot the male inhabitants, raped the women, and forced everyone else to flee with little more than the clothes on their backs.
- Forces of the government of Sudan have arrested civilians without charges, tortured them incommunicado, and released them as broken men and women to serve as a lesson to others.
- Forces of the government of Sudan have used the starvation of its citizens as a deliberate weapon of war.
- Terror remains the order of the day in Darfur, even as we speak.

When we speak of the responsibility of “forces of the government of Sudan” we mean, of course, the government of the defendant: President Al-Bashir. For his is a military dictatorship, a police state. President Al-Bashir sits at the very apex of the criminal conspiracy that is the Government of Sudan.

In its actions, the government of Sudan has taken a page out of the book of repressive regimes elsewhere that claim the right to terrorize their own citizens with impunity. And yet—starting with the historic Nuremberg and Tokyo trials following World War II—one-by-one these regimes have been discredited and their leaders called to account. Individual criminal accountability for perpetrating, aiding and abetting, or conspiring to commit international crimes is now the order of the day. This tribunal joins this proud tradition—the greatest tribute that reason has ever paid to power.

The defendant, President Al-Bashir, is charged with 3 great crimes. These are not mere domestic crimes of murder and mayhem—although such crimes have been described here in painstaking detail. Rather, these are international crimes: war crimes, crimes against humanity, and genocide. These are crimes of universal and not mere local concern.

Unlike President Al-Bashir's brethren who sat in the dock at Nuremberg, the defendant cannot here claim that the standards to which he will be judged violate principle of legality or the prohibition against *ex post facto* law. Indeed, the content of international criminal law has been firmly established by a consensus of a majority of the world's nations. Through the work of scores of human rights activists, lawyers, and like-minded governments, these crimes are now codified in the statute of the International Criminal Court, which provided the inspiration for the statute of this tribunal. As such, defendant Al-Bashir—since the time he vaulted himself to power by military coup in 1989—has had clear notice of what international law expects of his government, his armed forces, his militia, and of him personally as a member of the military, a national leader, and Commander-in-Chief.

Nonetheless, the evidence presented here today has established beyond a reasonable doubt that President Al-Bashir has enabled, supported, ordered, instigated, failed to prevent or punish, and turned a blind eye to the commission of awful crimes by his subordinates, accomplices, agents, and co-venturers. It is for his involvement in these crimes that he must now be held responsible.

Taking the crimes in question one by one...

President Al-Bashir has been indicted for the war crimes of murder, outrages upon human dignity, intentionally directing attacks against the civilian population, pillage, rape and sexual violence, and displacing civilians. It is uncontested that a civil war exists in Darfur, pitting the government of Sudan against various armed rebel groups. It is also uncontested that rather than fight this war by engaging the armed rebels in combat, the Armed Forces of the Government of Sudan have instead deliberately chose the easier targets—civilians, undefended villages, women and children, the internally displaced, people on the run.

This approach violates the foundational principle of the laws of war: the principle of distinction. This principle requires that combatants in their military operations must distinguish between civilians and other combatants, and between civilian objects and military objects. Only combatants may be the lawful target of attack. The military forces operating in Darfur under the command and control of the defendant as President and Commander-in-Chief of the Sudanese Armed Forces have turned this principle of distinction on its head. As the testimony presented today reveals, civilians and civilian objects have been the deliberate target of attack by members of the Sudanese air force and army. The attackers took no precautions to minimize civilian harm. Quite the contrary: attackers went out of their way to maximize civilian harm. In this fashion, forces under the effective command and control of the defendant have acted without any conceivable military justification, using disproportionate force and with complete and utter impunity.

To the extent that President Al-Bashir might argue that he should be given a margin of appreciation to counter an insurgency in his midst, such arguments should be rejected forthright. First, the laws of war make no distinction between just and unjust wars. The

rules of the game remain the same, and President Al-Bashir, as Commander-in-Chief, has flouted these rules. Second, the evidence presented is simply inconsistent with claims that violence by the armed forces was employed solely for counter-insurgency purposes. For his involvement in these crimes, President Al-Bashir should be convicted of war crimes.

The second great crime for which President Al-Bashir has been indicted is the offense of crimes against humanity. Crimes against humanity are a constellation of acts made criminal under international law when they are committed in the context of a widespread and systematic attack against a civilian population with knowledge of the attack. Constitutive acts alleged in the Indictment against President Al-Bashir are torture, unlawful detention, deportation, murder, extermination, rape, and persecution.

As the testimonies of Mr. Chad Curlett and Ms. Susannah Sirkin reveal, the people of Darfur have been the subject of a widespread and systematic attack since at least 2003. As Mr. El Gadi testified, the Government of Sudan has sponsored a web of clandestine torture centers to abuse and terrorize anyone who might oppose the government's repressive hold on society.

The defendant cannot credibly argue that he had no knowledge of such abuses being committed by his subordinates, his agents, his accomplices, and his co-venturers. By now, these crimes have been the subject of hundreds of governmental, non-governmental, and inter-governmental reports all made available to the government of Sudan and to President Al-Bashir personally. As Mr. El Gadi testified, Amnesty International regularly issued Urgent Actions on behalf of political prisoners detained by the Government of Sudan. These Urgent Actions result in hundreds if not thousands of letters being written on behalf of detainees. For all these Urgent Actions, the primary recipient was the Defendant, President Al-Bashir. For his involvement in these crimes, President Al-Bashir should be convicted of crimes against humanity.

And now, genocide. Genocide is the commission of enumerated acts against a protected group with the intent to destroy that group in whole or in part. Prohibited acts include:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group; and
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The genocide count thus involves three inquiries: whether the victims constitute a protected group, whether the protected group was subjected to one or more prohibited acts, and whether the defendant acted with genocidal intent.

As Professor Robert Collins and others testified, the Darfuri people constitute a protected group on three distinct bases: their ethnicity, their religion, and their race. With respect to ethnicity, Sudan is populated by a number of tribal groups that are defined in terms of

their lineage, their language, their beliefs, their history, and their lifestyles. Individuals know to which groups they, their friends and neighbors, and their tormentors belong. Thus, when Darfuris are attacked on the basis of their tribal affiliations, it is genocide against an ethnic group.

With respect to religion, both the victim and the perpetrator groups in Darfur practice Islam. However, the dominant group—following the teachings of hateful Arab Gathering—consider the Islam in Darfur to be an “inferior” strain, one that must be eradicated and replaced by a more “pure” and “correct” form. Thus, when Darfuris are attacked for their beliefs, it is genocide against a religious group.

With respect to race, although the concept of race is a social construction, it remains a potent one in Darfur where the rhetoric of violence is racialized. Darfuris are targeted because they are perceived of to be an inferior “African” race, as compared with the superior “Arab” race, just as the Nazis viewed people of the Jewish faith and people of Slavic ancestry to be “inferior” races. Thus, when Darfuris are attacked on the basis of these subjective perceptions of racial difference, even when no credible scientist would ratify these perceptions, this is genocide against a racial group.

Many of the same acts that constitute crimes against humanity—including killing and mistreating members of the group—constitute the acts of genocide. In addition, the prohibition of genocide reaches a broader array of conduct. This includes acts that might not injure or kill a protected group immediately or outright, but that when inflicted over a period of time against members of the group would bring about the group’s physical destruction in whole or in part. As Ms. Sirkin and others testified, forces of the government of Sudan have endeavored to bring about the “slow death” of people in Darfur. This has included the forced starvation of a protected group; the poisoning of wells and the destruction of sources of food; and the very dismantling of the infrastructure of survival that sustains life in Darfur.

The final element of genocide is *mens rea*. It was this element of the crime of genocide that prevented the U.N. Commission of Inquiry from reaching the conclusion that the government of Sudan was implementing a policy of genocide in Darfur. However, the COI did reserve judgment on whether particular individuals were acting with genocidal intent. President Al-Bashir is one such individual.

The evidence presented here today is consistent with an intent to destroy the Darfuri people in whole or in part. In addition, to the extent that President Al-Bashir is indicted as an accomplice or conspirator with others, this tribunal need only find that he knew that the principal perpetrators—be they members of the armed forces or the *janjiweed*—possessed genocidal intent. Thus, the Prosecution need not lead evidence of the defendant’s own genocidal intent. It is enough that the defendant knowingly assisted or joined with individuals acting with genocidal intent.

The defendant has been silent in these proceedings, but the extraordinary nature and magnitude of these crimes—and the overwhelming evidence that establishes them—

speak for themselves. The perpetration in Darfur of three great crimes has thus been proven. The question that remains to be decided is whether this defendant should be held responsible for them.

The Prosecution does not here contend that the defendant personally committed the crimes with which he is charged. Under international law, like domestic law, this is unnecessary to secure a conviction. Instead, the Prosecution charges the defendant under three doctrines of vicarious liability: superior responsibility, complicity, and joint criminal enterprise (JCE).

The doctrine of command responsibility provides that a superior can be held criminally responsible for the acts of his subordinates if he knew or should have known that his subordinates were committing abuses and he failed to prevent or punish them.

The doctrine of complicity provides that an individual can be held criminally responsible for the acts of his accomplices so long as the individual knowingly provided assistance to the commission of crimes.

The doctrine of JCE provides that an individual can be held criminally responsible when he associates with others to effectuate a shared criminal purpose. Individuals can be held responsible for the commission of the criminal objectives of the group and also for any crimes that were the natural and foreseeable result of the shared criminal goals of the group.

Defendant Al-Bashir exercises effective command and control over all elements of the Sudanese armed forces, including the Air Force and the People's Defense Forces. No soldier in Darfur outranks President Al-Bashir. To the extent that president Al-Bashir is not the formal superior of the *janjiweed*, he has been charged with instigating, aiding, and abetting their actions and with engaging in a joint criminal enterprise with them and with other members of the Arab Gathering and his own government. President Al-Bashir's government created the *janjiweed* as a proxy force with deniable ties to the central government. The government armed them, funded them, and set them loose with promises of war booty and impunity. President Al-Bashir cannot now be absolved of responsibility for creating the *janjiweed*, even if he cannot "put the genie back in the bottle."

These war crimes, crimes against humanity, and acts of genocide are not unplanned, isolated, or spontaneous offenses. Aside from the undeniable evidence of their coordination and advanced planning, it is sufficient to ask

- whether more than 2 million people could forcibly dislodge from their homeland on the basis of their blood and birth,
- whether more than 200,000 people could be forced across an international border to a life of squalor and want,
- whether hundreds of far-flung villages in a region the size of France could be destroyed through the identical tactics, and

- whether armed horsemen—wearing official army uniforms and carrying government-issue weapons—could be allowed to operate with complete impunity alongside members of the military

except by a common plan designed, orchestrated, and implemented by the central government of Sudan with President Al-Bashir at the helm. President Al-Bashir cannot argue that he was without authority, without knowledge, without influence, without importance, or without responsibility in Darfur. Such a stack of denials cannot but collapse under the weight of their collective improbability.

Each of the theories of responsibility pled in the Indictment has thus been proven before this tribunal.

Defendant offers no defense on the merits. Indeed, he has not deigned to even appear here to face his accusers. Even if he were here, what could he credibly say in his defense? The evidence is overwhelming. The Prosecution's case is unassailable, because it is the truth.

This tribunal has no army, no air force. It cannot order a military intervention to stop the carnage. It cannot send troops to protect the people of Darfur from further harm. Rather, this tribunal has at its disposal mere words—words given great force by the august stature of this panel and the world population that stands behind you. We are presented here with an opportunity to prove that the pen may defeat the sword and that injustice, duly proven, can compel people of conscience and commitment to act.

The witnesses testifying here today are right: the story of Darfur is one of destruction and denial. However, this tribunal should not let this defendant's denials absolve him of responsibility for the overwhelming destruction he and his henchmen have caused. This tribunal should instead accord him the infamous titles that he deserves: war criminal, enemy of all humanity, and—indeed—*genocidaire*.

The Prosecution asks for a conviction on all counts of the indictment.

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